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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 19, Original

EX PARTE: THE UNITED STATES, PETITIONER.

ON RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES DISTRICT COURT.

FRANCIS BIDDLE,
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BRIEF FOR THE UNITED STATES DISTRICT COURT.

ARGUMENT.

I.

When a Mandamus May Issue.

(*a*) *To enforce the performance of a ministerial but not of a discretionary act.*

It is an accepted principle of our law that mandamus may be used to compel the judge of an inferior court,

or executive officer, to act when he has refused to act;[1] or to perform a purely ministerial act.[2] But it will not issue where any discretion or judgment is to be exercised. Thus in *Ex parte Myra Clarke Whitney,* 13 Pet. 404 (1839), Justice Story said, p. 408: "A writ of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority; although they may seem to bear harshly or oppressively upon the other party".[3]

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[1] An example of this is where a district court refused to act on a motion to quash an indictment and on a motion for speedy trial, the mandamus issued by the Circuit Court of Appeals in aid of its appellate jurisdiction. *Frankel* v. *Woodrough,* 7 F. (2nd) 796 (1925).

[2] Failing to seal a bill of exceptions; but not to force the trial judge to include the entire charge in the record. *Ex parte Crane,* 5 Pet. 190 (1831); or to complete a record by signing a judgment. *Life and Fire Insurance Company of New York* v. *Wilson's Heirs,* 8 Pet. 291, 304 (1834): "On a mandamus a Superior Court will never direct in what manner the discretion of an inferior tribunal shall be exercised"; but not to enter a judgment where any discretion is involved. *The Life and Fire Insurance Company of New York* v. *Christopher Adams,* 9 Pet. 573 (1835).

[3] A line of cases held that mandamus will lie to compel a circuit court to remand a case, where it has no jurisdiction, on the theory that the "discretion" must be exercised within the "limits of jurisdiction." *In re Winn,* 213 U. S. 458 (1908), citing previous cases to the same effect. But these decisions are overruled in *Ex parte Roe,* 234 U. S. 70 (1913), where Mr. Justice

A long line of cases establishes this view. Brief quotations are sufficient:

> "The only acts to which the power of the courts, by *mandamus*, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer."
>
> *The United States* v. *Guthrie*, 17 How. 284, 304 (1854).

> "Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to enter judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render * * *."
>
> *Ex parte Newman*, 14 Wall. 152, 165 (1871).

And mandamus will not always lie even to compel the performance of a ministerial act. Mr. Justice Lamar said:[1]

Van Devanter said, p. 73: "The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision."

[1] *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636, 644 (1891). Such a case would seem to be *Ex parte William Many*, 14 How. 24 (1852), where the

> "It is proper here to remark, as applicable to the determination of this case, that, in the *extreme caution with which this remedy is applied* (italics ours) by the courts, there are cases where the writ will not be issued to compel the performance of even a purely ministerial act."

(*b*) *Mandamus should not be used for an appeal or writ of error.*

This Court has continually emphasized such a view. If mandamus will not issue where judgment is involved it follows that it will not lie to correct erroneous judgment. Judge Dickinson may be mistaken in refusing a bench warrant. Such error yields no ground for mandamus. Judge Story says in another case: "Now a writ of mandamus is not a proper process to correct an erroneous judgment or decree rendered by an inferior court."[1]

(*c*) *Mandamus will not issue to review an interlocutory order.*

Judge Dickinson's order was interlocutory; and not therefore appealable. This the United States admits (brief, p. 9). "Least of all can a writ of mandamus be granted to review a ruling or interlocutory order made

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court left a blank space in the record where costs should have been taxed. A mandamus to compel the court to fill in the blank was refused, the court having refused a motion to so amend the record, and having thus exercised its discretion.

[1] *Ex parte Hoyt*, 13 Pet. 279 (1839).

in the progress of a cause." *American Construction Co.* v. *Jacksonville etc. Railway Co.,* 148 U. S. 372 (1892). And, the case holds, it does not follow, as the United States argues (brief, p. 4), that because the United States cannot appeal, mandamus is a remedy (p. 379).[1]

(*d*) *Mandamus is an extraordinary remedy.*

"Mandamus is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what that action shall be. * * * It may not be resorted to * * * for the purpose of controlling minor orders made in the conduct of judicial proceedings, and the fact that the result of litigation may possibly be such that interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use for the purpose of forbidding such proceedings * * * even though the order cannot be reversed on error or appeal." *Ex parte Wagner,* 249 U. S. 465 (1918).

"The obligation must be peremptory and plainly defined. The law must not only authorize the act, it must require it to be done."[2]

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[1] It is interesting to note, in this connection, that this Court said, in *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522 (1866), 534: "It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal."

[2] *McCarty* v. *United States,* 19 F. (2nd) 462 (1927), Circuit Court of Appeals for the Eighth Circuit.

II.

A Bench Warrant Issues on Probable Cause.

The Fourth Amendment of the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Solicitor General suggests that the return of an indictment is "at least *prima facie* evidence of probable cause" (brief, p. 6). But the determination of probable cause involves an act of judicial discretion, particularly if the indictment is but *prima facie* evidence. The expression implies that in face of better evidence the presumption may be overcome, and probable cause found lacking—a judicial determination.

The point is illustrated in extradition proceedings. There the indictment furnishes ground for probable cause, raising a presumption which may be overcome. *Benson* v. *Henkel*, 198 U. S. 1 (1904). In that case Mr. Justice White said, p. 16:

> "*But the order of removal involves judicial rather than mere ministerial action* (italics ours) and must be issued by the judge of the District when the case made warrants it * * * and whether found in the indictment, or as the

> result of other testimony, the order to remove the accused can only be issued upon a showing of probable cause."[1]

And in *Price* v. *Henkel*, 216 U. S. 488 (1909), the Court said that the introduction of the indictment on a petition for an order of removal was "at least a *prima facie* case for the removal," but was not conclusive. Removal requires judicial inquiry.[2]

III.

This Court Has Specifically Ruled the Question.

The Supreme Court decided, as early as 1795, that the issuing of a warrant of arrest is a *judicial* act.

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[1] The United States says that no preliminary hearing is necessary (brief, p. 6). This is unquestionable law. But the accused has the right to contest jurisdiction in a removal proceeding. *Hughes v. Gault*, 271 U. S. 142 (1926), Mr. Justice Brandeis dissenting, on the ground that the accused was denied his constitutional rights under the Fifth Amendment when the Commissioner refused to consider his evidence bearing on probable cause.

[2] This and the other cases cited by the United States (brief, p. 6) all deal with petitions for removal. I can find no cases specifically holding that an indictment furnishes probable cause for the issuance of a warrant of arrest, although such seems to be the practice. Informations, unsupported by affidavit, do not furnish the necessary grounds. *United States* v. *Turcaud*, 20 F. 621 (1884); *Johnston* v. *United States*, 87 F. 187 (1898); *United States* v. *Baumert*, 179 F. 735

The United States v. *Judge Lawrence,* 3 Dal. 42.[1] A motion was made by the Attorney General of the United States for a rule to show cause why a mandamus should not be directed to Judge Lawrence, of the District of New York, to compel him to issue a warrant for apprehending Captain Barre, a commander of the frigate *Le Perdrix,* belonging to the French Republic. The application for the warrant was made by the French Consul, under authority of a consular convention between France and the United States. The judge refused to issue the warrant on the ground that the convention required production of the ship's registry to prove that Barre was one of the crew; and would not accept a copy of the "Role d'equipage," certified by a Vice-Consul, claimed to be sufficient under the convention. The court said:

(1910); *Weeks* v. *United States,* 216 F. 292 (1914—2nd C. C. A.); and *United States* v. *Michalski,* 265 Fed. 839 (1919) where a warrant of arrest was refused though the information was supported by an affidavit made on information and belief. The latter case quotes at length from an opinion to the same effect by Mr. Justice Bradley, sitting in circuit, in *Re Rule of Court,* 3 Woods 502, Fed. Cas. No. 12,126, holding that the committing magistrate must be given an opportunity to "judge for himself" whether probable cause exists —obviously an act of discretion. The indictment, after all, is nothing else than a statement that someone has found probable cause. Finding probable cause for the issuance of a search warrant is a judicial function. *U. S.* v. *Harnich,* 289 F. 256 (1922).

[1] Also reported in 3 Dal. 42 (Pa.), where the arguments are reported at length.

> "We are clearly and unanimously of the opinion that a mandamus ought not to issue. It is evident, that the District Judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment but his own."

The government's brief overlooks the case, and cites, in a footnote (p. 7) two State cases alleged to sustain its position. But in the Louisiana case there was an order of the court, authorizing the arrest, so that the *clerk's* act, in issuing the warrant, was ministerial.

The State authorities are in conflict. In *State of Washington ex Rel. Romano* v. *Yakey,* 43 Wash. 15 (1906), the State Supreme Court refused to mandamus a committing magistrate to hear a case which he had dismissed because he thought that the district attorney should have first investigated it. The court said, p. 21:

> "Whether a warrant should issue or not is a question this court will not determine, nor can we control the judgment or discretion of the officer to whom the application was made."

Mandamus will not lie to compel a magistrate to issue a warrant of arrest. *People* v. *McGuire,* 151 Ap. Div. (N. Y.) 413 (1912), p. 415: "Such error may not be corrected by mandamus, and the magis-

trate compelled to issue either a warrant or a summons." The issuance of a warrant of arrest is a judicial act, *DeGraff* v. *State*, 2 Okl. Cr. 519 (1909); the magistrate's conclusion as to what constitutes probable cause is conclusive, *United States* v. *Ocampo*, 18 Philippine 1, 42; and is not subject to review. *In Re Broom*, 18 Can. Cr. Cas. 254.

Several States, however, take the opposite view. *Benners* v. *The State*, 124 Ala. 97 (1899); *Attorney General ex rel.* v. *Police Justice of Detroit*, 40 Mich. 631 (1879); *Nebraska ex rel.* v. *McCutcheon*, 20 Neb. 304 (1886); *State ex rel.* v. *Laughlin*, 75 Mo. 358 (1882). In the last case cited Mandamus issued to compel the lower court to assume jurisdiction of a case; and some of the cases can be explained on the theory that the appellate court believed that the magistrate had refused to act; not that he had considered the question and had then declined to issue a warrant. This distinction is made in the English cases. *Reg.* v. *Adamson*, 1 Q. B. Div. 201 (1876), where the mandamus was allowed because the court thought that the justices had not exercised discretion, but had acted from considerations "apart from the facts"; but in *Rex* v. *Bros.*, 85 Law Times 581 (1901), Lord Alverstone refused a mandamus to compel a magistrate to issue a summons, since an act of discretion was involved.

If Judge Dickinson had no discretion he would not even be permitted to examine the indictment to see if a crime were properly alleged.

The judge may have been grossly mistaken in his decision. But he did not refuse to act. This action involved a judicial determination. The judgment was interlocutory. Mandamus should not be used to correct it. That the United States has possibly no other remedy is unfortunate. But the situation would not have arisen had the accused been brought before a United States Commissioner in the first instance.[1]

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[1] The question of where the writ should issue, if at all, is not here raised, as a decision of the judge's power is desired. But because no appeal could be taken to the Circuit Court of Appeals from this interlocutory order, does not mean that the case is not within the "appellate jurisdiction" of that court. And it may be doubted whether this court has power to issue the writ where its jurisdiction is neither original nor appellate. *In Re Massachusetts*, 197 U. S. 482 (1905); *In re Glaser*, 198 U. S. 171 (1905). For a recent discussion see *In re Babcock*, 26 F. (2d) 153 (1928).

Respectfully submitted,

FRANCIS BIDDLE,
for the Hon. Oliver B. Dickinson and the United States District Court for the Eastern District of Pennsylvania.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES DISTRICT COURT.

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(Under Order of Court Permitting Filing of Further Briefs, Entered October 10, 1932.)

ARGUMENT.

Judge Dickinson's Opinion.

The grounds of the District Court's refusal to issue a bench warrant must be clearly understood to determine the nature of the judicial discretion so exercised.

The order denies the motion for a bench warrant on the opinion filed (Record, 7). The opinion, however, in denying the prayer of the petition, expressly gives "leave to the United States Attorney to submit proof of facts so that the Bench Warrant, if issued, will have the support required by the Fourth Amendment (Record, 25)." The court admits the right of the United States to indict in the first instance under the authority of the *Thompson* case (1). In that case the court held that a grand jury could indict, where another grand jury had ignored, without leave of court. The case arose in Pennsylvania, where the State decisions had laid down a contrary rule (2); but were held not controlling as being in conflict with the rule in United States courts. But in the *Thompson* case the grand jury was acting, and, it was held, could act, without the aid of the court. Here to bring the defendant into court the District Attorney must obtain the court's leave.

Judge Dickinson does not decide that, where an indictment first issues, he will not grant a bench warrant. He decides that in this particular case he will not grant the warrant on the naked petition and indict-

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(1) 251 U. S. 407 (1920). In *Albrecht* v. *United States,* 273 U. S. 1 (1926), Mr. Justice Brandeis held that leave to file an information must first be obtained, in spite of certain language in the *Thompson* case, thus upholding the discretion of the trial judge in controlling this practice. The Justice points out that this was the practice in most jurisdictions (note. p. 5).

(2) Collected in note, p. 415.

ment, unsustained by supporting evidence. He holds that where a man has been indicted without preliminary hearing the court has discretion, and on occasion will exercise it, to refuse a warrant for his arrest, to examine into the facts (as in *habeas corpus*, removal, and petition for bench warrant on an information) "so that the Bench Warrant, if issued, will have the support required by the Fourth Amendment (1)."

The Solicitor General argues that the process of law has been arbitrarily blocked. But the District Attorney could have proceeded by bowing to the court's exercise of discretion, and by introducing evidence to establish, in that manner, a *prima facie* case. If, when such evidence had been introduced, the petition had been refused the action might have been arbitrary; though not even then would their have been ground for mandamus.

And that the law permits filing an indictment as a preliminary step does not sanctify such practice. "If an indictment is secretly found and a bench warrant follows a defendant may be hauled into court by 'railroad' * * * All the protection before given accused person, is thus cut out except that given by the Grand Jury * * * We can readily understand that this is a great convenience to the United States Attorney and the Inspector officers. It is, however, at the cost of ignoring the United States Commissioners and of denying the accused the right, through a denial of the opportunity, to get the judg-

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(1) Record p. 25.

ment of the Court upon the question of probable cause (1)."

The court suggests—as a test of the question—that it should not be forced "without inquiry to deprive anyone of his liberty when upon such inquiry the judgment of the court would be that such deprivation would be unwarranted (2)". And the court adds that the question of the *existence* of the power must not be confused with the *propriety of its exercise.* Until evidence is submitted to support the petition the latter question does not arise.

The discretion here exercised is recognized in the English cases. Lord Alverstone refused a rule for a mandamus to compel a magistrate to issue a summons for an offense against the Roman Catholic Relief Act because the magistrate had taken jurisdiction, but had exercised a discretion "that he will or will not allow the process of the court (3)", saying, p. 756:

"The justices may, however, it would seem, in the exercise of their discretion refuse to issue a summons even though there is evidence before them of an alleged indictable misdemeanor, if they consider that the issue of the summons would be vexatious or improper. * * * It is impossible to say that there

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(1) Record, p. 15, 18, 19.

(2) Record, p. 20.

(3) *Rex.* v. *Kennedy,* 86 L. T. 753 (1902).

is no discretion simply because there is *prima facie* evidence that an indictable offense has been committed (757) (1)."

A similar decision was made by this Court in *Ex parte Burtis* (2). The Court refused a mandamus to compel a witness to obey a subpœna *duces tecum*. "The District judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism; but we cannot, by *mandamus*, compel him to undo what he has thus done in the exercise of his legitimate jurisdiction."

The District Court suggests that its order refusing the petition is as much a final order, and thus subject to review, as the quashing of the indictment in the *Thompson* case (3). But there the case was at an end. Here the indictment is still pending; and the United States is at liberty to renew its application for a bench warrant, supported by evidence.

The question of this Court's jurisdiction to issue a writ was touched on in our first brief (Note 1, p. 11).

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(1) See also, to the same effect, *Ex parte Lewis*, 21 Q. B. Div. 191 (1888), both cases distinguishing the *Adamson* case (Brief for U. S. District Court, p. 10).

(2) 103 U. S. 238 (1880).

(3) Record, p. 24.

The true test is the existence of the jurisdiction, and not its prior invocation (1).

Respectfully submitted,

FRANCIS BIDDLE,
For the Hon. Oliver B. Dickinson and the United States District Court for the Eastern District of Pennsylvania.

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(1) *Barber Asphalt Co.* v. *Morris*, 132 F. 945, 955 (1904); *M'Cluny* v. *Silliman*, 6 Wheat. 598 (1821); *Bath County* v. *Amy*, 13 Wall. 244 (1871); *McClellan* v. *Carland*, 217 U. S. 268 (1910); *Del. Lack. & W. Ry. Co.* v. *Relstab*, 276 U. S. 1 (1927); *Re Babcock*, 26 F. (2d) 153 (1928). For cases which held that the appellate jurisdiction had to be actually invoked see *Muir* v. *Chatfield*, 255 F. 24 (1918); *United States* v. *Judges of United States Court of Appeals*, 85 F. 177 (1898). If the judgment is appealable mandamus will not lie; nor even where there is no appeal unless it appears that the court below had refused to act. *Ex parte Newman*, 14 Wall. 152 (1871).